

Food & Beverage

LITIGATION UPDATE

Issue 218 • June 8, 2007

Table of Contents

Legislation, Regulations and Standards

- [1] Agency Reports Children Exposed to Fewer TV Food Ads1
- [2] FSIS Announces Agenda for Upcoming Codex Alimentarius Meeting .. 2

Litigation

- [3] FTC Seeks TRO to Stop Merger of Natural-Food Chains2
- [4] EU Court Rules Swedish Alcohol Monopoly Illegal3

Legal Literature

- [5] Charles Cantu, "Fattening Food: Should Purveyors of Fast Food be Required to Warn? A Call for a New Tort," *Journal of Food Law & Policy*, Spring 20063

Other Developments

- [6] Food Issues Think Tank Launches Mediterranean Diet Packaging Symbol4
- [7] Ad Agencies Tap Cognitive Scientists for Fresh Perspective4

Media Coverage

- [8] Jeffrey Kluger, "The Science of Appetite," *Time*, May 30, 20075
- [9] Diane Brady, "Pepsi: Repairing a Poisoned Reputation in India," *Business Week*, May 31, 20075

Scientific/Technical Items

- [10] Research Suggests Bacteria May Have Role in Obesity6

Shook,
Hardy &
Bacon, L.L.P.



www.shb.com

Food & Beverage

LITIGATION UPDATE

Legislation, Regulations and Standards

Federal Trade Commission (FTC)

[1] Agency Reports Children Exposed to Fewer TV Food Ads

The FTC has released a [report](#), *Children's Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate*, which concludes that while “1977 studies do not give a complete estimate of children’s exposure to food ads,” using other period data, “we find that food ad exposure has not risen and is likely to have fallen modestly.” The report is based on Nielsen Media Research/Nielsen Monitor-Plus data and focuses on children ages 2 to 11. FTC staffers who prepared the report estimate that children in that age group watch an average of 2.25 hours of ad-supported television each day and that 28 percent of the 25,600 TV ads they viewed are promotions for television programming, while “food ads account for 22 percent.” Half of the food ads children see and about one-third of their total TV advertising exposure appear on programs for which children comprise at least 50 percent of the audience.

The data apparently show that “[c]hildren saw approximately 2 percent fewer minutes of advertising and 19 percent fewer minutes of paid advertising in 2004 than in 1977. These reductions

reflect the combined impact of the reduced amount of time children spend watching ad-supported television in 2004 compared to 1977 and ads that are shorter on average.” According to the commission, children neither see more advertising today for low-nutrition foods nor do the data support hypotheses linking TV food ads to rising levels of obesity. In fact, says the FTC, “advertisements for sedentary entertainment products outnumber food advertisements by two to one and constitute most of the other advertising on children’s programming. Presumably these products would expand their advertising further, if food advertising is reduced. Whether such a shift in advertising seen by children would affect obesity in U.S. children – either positively or negatively – is an open question which has received little attention.”

The report specifically notes that the study was limited to TV advertising and that producers are increasingly relying on other media to market their goods. The FTC is conducting a separate study on all methods of food marketing and will be co-hosting a Forum on Marketplace Responses to Childhood Obesity with the Department of Health and Human Services on July 18, 2007, to “review industry-wide initiatives and specific product, packaging, and marketing innovations implemented by individual companies.” The Center for Science in the Public Interest (CSPI) released a statement claiming the FTC’s report is “hardly a cause for much celebration. As parents know, television is just one slice of an ever-expanding pie of food



marketing aimed at kids.” CSPI anticipates that the FTC’s research on other forms of advertising, such as school marketing, Web site games and licensed “spokescharacters” on food packaging, “will likely show that food advertisers are engaging in a massive, sophisticated multimedia campaign to get kids to eat junk food.”

The FTC acknowledges that its report contradicts other studies; the Kaiser Family Foundation’s study, released in March, concluded that children see more junk food ads than ever before at a rate that is double the FTC’s figure. Additional information about that study appears in issue 208 of this Report. See *FTC and CSPI Press Releases*, June 1, 2007.

Department of Agriculture (USDA)

[2] FSIS Announces Agenda for Upcoming Codex Alimentarius Meeting

USDA’s Food Safety and Inspection Service (FSIS) this week [announced](#) the sanitary and phytosanitary standard-setting (SPS) activities of the Codex Alimentarius Commission (Codex), which will convene July 2-7 in Rome for its 30th Session. The SPS activities will include Codex committees on (i) veterinary drugs in foods; (ii) contaminants in foods; (iii) food additives; (iv) pesticide residues; (v) methods of analysis and sampling; (vi) food import and export inspection and certification systems; (vii) food labeling; (viii) food hygiene; (ix) fresh fruit and vegetables; (x) nutrition and foods for special dietary uses; (xi) milk and milk products; and (xii) processed fruits and vegetables.

Meeting at the 30th Session, the Codex Committee on Contaminants in Foods will continue work on the Codex General Standard for Food Contaminants and Toxins in Foods, as well as reviewing maximum levels for several substances

and a proposed Code of Practice for the Reduction of Acrylamide in Food. The Committee on Food Additives will also endorse or revise maximum levels for food additives and processing aids in Codex standards. The Committee on Food Import and Export Inspection and Certification Systems will address proposed draft guidelines for generic official certificates and discuss a paper identifying guidance areas for national food inspection systems. In addition, the Committee on Nutrition and Foods for Special Dietary Uses will continue work on standards for gluten-free foods and guidelines for the use of nutrition claims.

During a previous meeting, the Committee on Food Labeling considered a draft Global Strategy on Diet, Physical Activity and Health; guidelines for organically produced food; and a working group report on labeling genetically modified foods. On September 3-7, the Committee on Veterinary Drugs in Foods will draft maximum residue limits for flumequine, melengestrol acetate, colistin, ractopamine, erythromycin, and triclabendazole. The Ad Hoc Intergovernmental Task Force on Foods Derived from Biotechnology will also meet November 26-30 to consider draft guidelines for assessing the safety of foods derived from recombinant-DNA animals.

FSIS is seeking comments on these SPS activities and recommendations for new standards, which can be submitted via the [Federal eRulemaking Portal](#) or by mail.

Litigation

[3] FTC Seeks TRO to Stop Merger of Natural-Food Chains

The Federal Trade Commission has filed a complaint in the U.S. District Court for the District of Columbia seeking a temporary restraining order



and preliminary injunction to halt the acquisition of Wild Oats Markets, Inc. by Whole Foods Market, Inc. pending an administrative trial. FTC contends that the merger would violate provisions of the Clayton Act intended to prevent the formation of monopolies. According to FTC, the \$565-million transaction would allow the largest premium natural and organic supermarket chain in the United States to acquire its closest competitor and longtime rival, thereby reducing direct competition. "After the merger, Whole Foods would be able to raise prices unilaterally, to the detriment of customers of premium natural and organic supermarkets," the commission contends.

"Grass-fed organic baloney," said company executives, who plan to vigorously defend the deal. They noted, "The FTC has failed to recognize the robust competition in the supermarket industry, which has grown more intense as competitors increase their offerings of natural, organic and fresh products, renovate their stores and open stores with new banners and formats resembling" the natural-food chains' environments. FTC counters by distinguishing the chains from conventional retail markets, citing "the breadth and quality of perishables – produce, meats, fish, bakery items, and prepared foods – and the wide array of natural and organic products and services and amenities" offered. A *Wall Street Journal* article, suggesting that the legal argument will boil down to whether the deal involves natural-food chains or grocery stores, observes that the Bush administration has rarely challenged the merger of direct rivals. Yet, the FTC apparently has a long history of challenging mergers among food retailers that predates the current administration.

The two companies apparently own about 300 stores in the United States, Canada and the United

Kingdom. Whole Foods accounts for 12 percent of the \$46-billion natural-foods market, while Wild Oats has about a 3-percent market share. Industry analysts contend that the merger cannot possibly create a monopoly given the companies' modest market presence. See *FTC Press Release*, June 5, 2007; *BusinessWeek*, *The Wall Street Journal* and *WSJ Law Blog*, June 6, 2007.

[4] EU Court Rules Swedish Alcohol Monopoly Illegal

The European Union's Court of Justice has reportedly determined that a Swedish law barring private citizens from importing alcohol violates EU law because it inhibits the free movement of goods and "cannot be justified on the grounds of protection of the life and health of humans." The challenge was brought by Swedish residents who sought to bypass Systembolaget, the state-owned monopoly, and purchase Spanish wine through a Danish Web site because it was less expensive. Systembolaget confiscated the wine, and the purchaser filed suit in a Swedish court where it was referred to the Swedish Supreme Court, which asked for the EU court's opinion. According to a news source, the Supreme Court will now decide how to apply the ruling. See *International Herald Tribune*, June 5, 2007.

Legal Literature

[5] Charles Cantu, "Fattening Food: Should Purveyors of Fast Food be Required to Warn? A Call for a New Tort," *Journal of Food Law & Policy*, Spring 2006

This recently published article explores how extending tort-law liability could require fast-food companies to plainly label their offerings, so the



public will understand that certain of their foods are “likely to cause harm if eaten frequently.” South Texas Law Professor Charles Cantu, an American Law Institute Fellow and Fulbright Scholar, compares the over-consumption of unhealthy foods to the long-term use of cigarettes and alcohol. He contends, “excessive consumption of fattening fast food presents a foreseeable risk of harm. The medical profession, as it has done in cases involving alcohol and cigarettes, has established this undeniable fact.” Thus, he believes that a duty to warn has been established, “and if the other elements of actionable negligence – breach, proximate cause, and injury – are present, a cause of action has been established.” While he recognizes that choice is the consumer’s responsibility, Cantu argues that the buyer “should be informed.” He suggests that colored stickers be affixed to fast foods depending on their calorie, fat and other “unnecessary substances” content.

Other Developments

[6] Food Issues Think Tank Launches Mediterranean Diet Packaging Symbol

Oldways Preservation Trust this week launched a Mediterranean diet packaging symbol designed to flag products that conform to the popular eating plan, which advocates increased consumption of cereals, fruits and vegetables, and decreased red meat intake. The Med Mark, which depicts an amphora, will denote foods that follow the Mediterranean Diet Pyramid developed in 1993 by Oldways, the Harvard School of Public Health and the World Health Organization. Products eligible for the program must also comply with limitations on processing, *trans* fats, saturated fats, sodium, and sugars. “The Mediterranean diet is backed by strong

science and terrific flavors and now with the Med Mark, consumers can easily find these health-promoting products,” an Oldways spokesperson said in describing the diet’s links to cardiovascular health and cancer protection. Several manufacturers of olive oil, pasta and grain goods have reportedly expressed interest in the Med Mark, which Oldways has compared to two previous initiatives, the Whole Grains Stamp appearing on 1,200 products and the Latino Nutrition Coalition brochure describing healthful shopping habits. *See Food Navigator USA.com* and *Oldways Press Release*, June 5, 2007.

[7] Ad Agencies Tap Cognitive Scientists for Fresh Perspective

A Boston-based advertising agency has reportedly employed cognitive scientists to fine tune marketing material, including Ocean Spray’s TV spot for diet cranberry juice. Consumers apparently ranked the Ocean Spray commercial, which features two cranberry growers, in the top 10 percent of 8,500 ads tested in a recent Millward Brown survey, despite the non-traditional pitch. Havas’s Arnold Worldwide said cognitive scientist and fulltime employee Lisa Haverty, Ph.D., used her expertise to make the ad more memorable. In the original version, women having a party joined the Ocean Spray cranberry growers in a bog, but Haverty argued that replacing the party with an exercise class created a more direct message. “Each of the tweaks Ms. Haverty makes is based on theories in cognitive science adapted to the realities of marketing,” reported a *Wall Street Journal* article describing a move toward science-driven marketing. Other marketers, however, have voiced skepticism about the practice. “Agencies can’t differentiate themselves. This is just about advertising agencies trying to fight off being commoditized,” one managing director was quoted as saying. *See The Wall Street Journal*, June 4, 2007.



Media Coverage

[8] Jeffrey Kluger, “The Science of Appetite,”
Time, May 30, 2007

“It’s not just that 67 percent of the U.S. population is either overweight or obese (including about 17 percent of children ages 6 to 19); it’s that we know that fact full well and seem helpless to control ourselves,” asserts *Time* writer Jeffrey Kluger in this article about the biological, chemical and psychological mechanisms that influence the appetite. Kluger explains that the “hunger hormone” ghrelin induces food cravings while other substances, such as cholecystokinin (CCK), the hormones CLP-1 and PYY, and leptin, suppress appetite once the digestive system registers fullness. He also contends, however, that regulating hunger is not as simple as manipulating these chemicals. “Adjusting the levels of just the few we know best is like upgrading the quality of the gas in your car and thinking that is going to boost it from 20 m.p.g. to 75 m.p.g.,” Kluger says.

In addition to experimental therapies ranging from leptin injections to cell receptor manipulation, Kluger covers “comparatively fast-track” approaches to controlling appetite. He examines recent studies suggesting that, for some people, “excessive eating mirrors the patterns of drug addiction,” with ghrelin playing a prominent role in both food and drug dependencies. Other researchers have apparently measured the metabolic impact of specific foods and developed diets that, for example, better balance the body’s glucose levels. Kluger points to the “volumetrics” eating plan developed by Barbara Rolls, a nutritional sciences professor at the Pennsylvania State University, who argues that consuming low-calorie, high-volume foods stimulates the digestive system’s distension nerves to

signal fullness. She also emphasizes that a varied diet is necessary to avoid “sensory-specific satiety” – or cravings for forbidden foods. “The very discordance between a mouthful term like *sensory-specific satiety* and the uncomplicated joy of a crème brûlée at the end of a meal speaks to the puzzle that is the human appetite,” Kluger concludes, ultimately casting hunger regulation as a battle between “the ancient impulse to eat” and “our modern ability to satisfy that urge.”

[9] Diane Brady, “Pepsi: Repairing a Poisoned Reputation in India,” *Business Week*, May 31, 2007

Business Week writer Diane Brady in this article examines PepsiCo Inc.’s response to claims that its Indian operations divert water resources from “parched” regions and use pesticide-tainted groundwater to manufacture local soft drinks. The activist group Center for Science and Environment (CSE) first charged PepsiCo with selling adulterated soft drinks in 2003, when CSE tests allegedly revealed that pesticide levels in Pepsi were 36 times the threshold set by the European Economic Commission. CSE claimed the soda contained lindane, DDT, malathion, and clorpyrifos, although the amount of pesticide “was far lower than what Indians put up with in most other foods,” according to Brady. CSE Director Sunita Narain, however, apparently leveraged the issue into outrage against multinational companies as “a powerful user of water,” with several states banning soda sales and protestors boycotting the products or defacing advertisements. “In this setting, a foreign company that diverts scarce water to manufacture a sugary, discretionary product is a ripe target for critics,” Brady contends, adding that detractors generally overlooked PepsiCo’s contributions to local water



programs. Meanwhile, the Indian government has “flip-flopped” between dismissing the allegations and brokering stricter guidelines for carbonated drinks, she says.

“If we get attention, it’s not because of the water we use. It’s because of what we represent,” PepsiCo Chief Executive Indra Nooyi said in reference to the charges. Nooyi has disputed the test results, although Brady notes that she “appreciates the anxiety many Indians feel over rapid change.” Countering a second CSE study released in 2006, PepsiCo went directly to the Indian media about its safety record, conservation efforts and community aid programs. One bottling factory has reportedly reduced water usage from 35 liters per case of 8-ounce bottles in 2005, to 8.6. liters. But Nooyi apparently believes PepsiCo will need to continue doing more than water conservation. “We have to invest, too, in educating communities in how to farm better, collect water, and then work with industry to retrofit plants and recycle,” she said.

Scientific/Technical Items

[10] Research Suggests Bacteria May Have Role in Obesity

A recent [study](#) by researchers in the United Kingdom, France and China shows that different types of gut bacteria interact with the host’s metabolism and affect the host’s ability to absorb and use fats. François-Pierre Martin, et al., “A top-down systems biology view of microbiome-mammalian metabolic interactions in a mouse model,” *Molecular Systems Biology* 3:112, May 2007. Such research confirms what others have found, i.e., that the intestines of obese people contain a different mix of microbes when compared with slim people.

“This raises the question of whether differences in the mix of bacteria in our guts predispose some of us to obesity: the number of calories harvested from a serving of cereal may not be the same for everyone – some people may extract slightly more than others and over time this will add up,” according to a Washington University School of Medicine researcher. Others speculate that obesity could be linked to antibiotic use and misuse, which can re-select the gut microflora. Professor Jeremy Nicholson of Imperial College London, who participated in the mouse study, was quoted as saying that such re-selection can “cultivate a much less friendly set of bugs in our general population . . . mapping the change in population obesity in the U.S. over the last 20 years looks rather like the spread of an infectious disease.” See *The Telegraph*, May 29, 2007



Food & Beverage

LITIGATION UPDATE

Food & Beverage Litigation Update is distributed by
Leo Dreyer and Mary Boyd in the Kansas City office of SHB.
If you have questions about the Update or would like to receive back-up materials,
please contact us by e-mail at ldreyer@shb.com or mboyd@shb.com.
You can also reach us at 816-474-6550.
We welcome any leads on new developments in this emerging area of litigation.

**Shook,
Hardy &
Bacon** LLP

Geneva, Switzerland

Houston, Texas

Kansas City, Missouri

London, United Kingdom

Miami, Florida

Orange County, California

San Francisco, California

Tampa, Florida

Washington, D.C.
